

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

## No. 172.

NORTHERN PACIFIC RAILWAY COMPANY AND THE  
FARMERS LOAN AND TRUST COMPANY, TRUSTEE,  
PETITIONERS,

vs.

E. W. McCOMAS.

### PETITIONERS' BRIEF.

#### Statement.

This is a writ of certiorari to review a decree of the Supreme Court of Oregon, affirming a decree of the Circuit Court for Umatilla County, in that State, quieting in the respondent, as against the petitioners, the title to five tracts of land in that county. All of these tracts are parts of odd-numbered sections within the place limits of the grant of lands made by the third section of the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, the predecessor in interest of the petitioner, Northern Pacific Railway Company (13 Stat., 365). The following are the facts out of which the question arises:

Previous to November 23, 1872, the lands in question were public lands. On that date, the State of Oregon claimed them under the Swamp Land Act of September 28, 1850 (9 Stat., 519), as extended and applied to the State of Oregon by the act of March 12, 1860 (12 Stat., 3), and this claim was pending June 29, 1883, when the Railroad Company filed its map of definite location (R., 16). Thereafter the State con-

veyed its supposed interest to the respondent's predecessors in interest, from whom, by mesne conveyances, he derived the claim of right under which he entered upon the lands. The State's claim, as to three of the tracts, has since been rejected by the Land Department; as to the remaining two it is still unadjusted (R., 9-12). Between 1906 and 1909 three of the five tracts were patented to the Northern Pacific Railway Company on the theory that, as they were parts of odd-numbered sections within the place limits of its grant, they belonged to that company; the remaining two have never been patented, but the Railway Company has selected and claimed both of them in lieu of other lands excepted from its grant on account of their mineral character.

September 25, 1912, respondent brought this action to quiet title, claiming to have been in possession "for more than ten years prior to the commencement of this suit adversely to defendants herein and all the world" (R., 2, 26). The Farmers Loan and Trust Company, as trustee under one of the Northern Pacific mortgages, was joined as defendant. December 4, 1912, the Northern Pacific Railway Company, believing that the patents to the three tracts had been issued inadvertently, and through failure to observe that the State's "claim" to them was pending on the date of definite location, reconveyed these three tracts to the United States, selecting them thereafter, however, in lieu of other lands excepted from its grant on account of their mineral character. May 25, 1914, one of the three tracts thus reconveyed was again patented to the Railway Company, this time under the mineral indemnity selection, and this patent the Railway Company now holds. The title to the other two tracts thus reconveyed still remains in the United States. The following history of the title to each of the five tracts in dispute\* is given for convenient reference (R., 9-12).

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\*Other tracts were described and their title was put in issue by the complaint; but the parties, by stipulation, eliminated all dispute except as to these five tracts (R., 9-12).

1. *Lot 2, Section 5, Township 5 North, Range 30 East*, included in State's swamp land list of November 23, 1872, but claim never passed on by Department; conveyed by State to respondent's predecessor August 10, 1892; patented to Railway Company May 4, 1909; reconveyed by Railway Company to United States December 4, 1912; included in mineral indemnity selection list No. 107, filed January 17, 1913, and claim thus made not yet disposed of by Department.

2. *Lot 4, Section 5, Township 5 North, Range 30 East*, included in swamp land list filed by State of Oregon November 23, 1872, and conveyed by State to respondent's predecessor; swamp land claim of State thereafter rejected by the Department; included in mineral indemnity selection list No. 101 filed by Railway Company and approved October 11, 1912, but not yet patented.

3. *North Half of Northwest Quarter of Section 7, Township 5 North, Range 30 East*, included in swamp land list filed by State of Oregon in 1872 and conveyed by the State to respondent's predecessor August 10, 1892. Swamp land claim of the State of Oregon thereafter disallowed by the Department; included in mineral indemnity selection list No. 67 filed by Railway Company and approved July 23, 1908, but patent not yet issued.

4. *North Half of Northeast Quarter of Section 7, Township 5 North, Range 30 East*. (Also described as Lots 1 and 2.) Included in swamp land list filed by the State of Oregon November 23, 1872, and conveyed by the State to respondent's predecessor August 10, 1892; swamp land claim never adjusted. Patented to Railway Company December 31, 1907; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection

list filed by Railway Company January 17, 1913. Claim based thereon not yet adjusted.

5. *Northeast Quarter of Southwest Quarter of Section 7, Township 5 North, Range 30 East*, included in swamp land list of the State of Oregon of November 23, 1872, and conveyed by the State to respondent's predecessor; claim of the State rejected March 15, 1895; patented to the Railway Company June 8, 1906; reconveyed by Railway Company to United States December 4, 1912, included in mineral indemnity selection list filed by Railway Company and approved January 17, 1913. Patent issued to the Railway Company upon the selection so made May 25, 1914.

In the trial court the respondent contended, and the court held (R., 34-36), that the State's swamp-land claim did not except the lands from the grant to the Northern Pacific Company; that title therefore vested in that company June 29, 1883, when map of definite location was filed; and that as respondent had occupied them for more than ten years previous to the commencement of the action he acquired title to them by adverse possession under the Oregon Statute (Lord's Oregon Laws, sec. 4).

On appeal the Supreme Court of Oregon, while conceding apparently that the trial court was wrong in deciding that the swamp-land selection was not a "claim," and in deciding that title had vested in the Railway Company on filing map of definite location, nevertheless affirmed the decree upon the ground that the mineral indemnity selections gave to the Railway Company no rights, and that, as between it and the respondent, the latter's adverse possession for more than ten years had vested title in him (R., 46-48).

On petition for rehearing the Supreme Court filed a second opinion (R., 54-56), modifying the decree so as to exclude the two tracts never patented, and allowing as to them an in-

junction against interference with respondent's possessory rights until action by the Land Department. As to the remaining tracts which had been patented and reconveyed to the United States, the decree was affirmed on the ground that the patents conveyed the legal title; that this title was lost to respondent as a result of his adverse possession and that of his predecessors; and that the reconveyances to the United States were ineffectual because it had not been shown that the United States had accepted the deeds. Both decisions are reported in 82 Oregon at page 639.

Thereupon this writ of certiorari was asked and allowed.

#### **Assignment of Error.**

The court erred in holding that it had jurisdiction to determine the title to the lands in question when it appeared that that title was in the United States.

#### **ARGUMENT.**

The State's swamp-land selection excepted the lands in question from the grant to the Northern Pacific Railroad Company. No principle of land-grant law is better settled than this. *Whitney vs. Taylor*, 158 U. S., 85; *Northern Pacific Railroad Company vs. Sanders*, 166 U. S., 620; *Northern Pacific Railroad Company vs. Musser-Sauntry Company*, 168 U. S., 604; *Nelson vs. Northern Pacific Railway Co.*, 188 U. S., 108; *Northern Pacific Railway Co. vs. Trodick*, 221 U. S., 208.

How slight a claim will operate so to except lands is strikingly shown in *Northern Pacific Railway Company vs. Wismer*, 230 Fed., 591, affirmed by this court under the same title in 246 U. S., 283.

And it is to be observed that in applying this principle, the question whether the "claim" was or was not valid is immaterial. As said in *Whitney vs. Taylor, supra*:

"It was not the intention of Congress to open a controversy between the claimant and the Railroad Company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant in respect to which the Railroad Company was not permitted to be heard."

The proposition that the Northern Pacific Company took title on filing its map of definite location in 1883, on which the trial court rested its decision in respondent's favor, is, therefore, clearly erroneous, and apparently the Supreme Court of Oregon concedes it to be so. It concedes, moreover, that as to the two tracts which were never patented, "a State court is powerless legally to interfere therewith" (R., 56), although even as to these two tracts it enjoins the petitioners from interfering with respondent's possession. But it goes on to hold that as to the three remaining tracts, the naked legal title was undeniably in the Northern Pacific Company at one time, by virtue of the patents actually, though erroneously, issued to that company; that the title thus held could not be surrendered to the United States, from which it was erroneously acquired, without an *aggregatio mentium* between it and the United States; and that as no such meeting of the minds had been shown, the legal title must be regarded as being in the Northern Pacific Company up to the time when it was lost to the respondent by his adverse possession. As to this, it is to be observed:

1. Even on this theory, the decision is clearly erroneous. If the title which the respondent acquired by prescription was that naked legal title which had vested in the Railway Company by the erroneous issue of the patents, it began only

with the date of those patents. The respondent certainly cannot be said to have held adversely to the Railway Company until its naked legal title began. The earliest of the three patents was dated June 8, 1906. The other two were dated December 31, 1907, and May 4, 1909 (R., 9-12). Adverse possession for a period of ten years is required under the Oregon statute before title is acquired by prescription (Lord's Oregon Laws, sec. 4), and, therefore, it is obvious that respondent had acquired no such title to any of the tracts on September 25, 1912, when his action was begun (R., 26), or even on April 7, 1916, when the decree was entered (R., 23).

2. It is, however, erroneous to say that anything was wanting to the complete revesting in the United States of the titles thus erroneously issued. That the Government accepted the title thus reconveyed is sufficiently evidenced by its attitude after the reconveyance, for it is clear that it claimed complete dominion over the lands, received and approved mineral indemnity selections covering them (R., 9-12), and actually reissued its patent to a portion of them (R., 11).

The situation therefore is that the courts of Oregon have assumed jurisdiction to determine rights in five tracts of land, the title to four of which was *sub judice* in the Land Department of the United States (where it still is) when the decree was rendered, and the title to the fifth of which, though declared by the court to be in the respondent as the result of his ten years' adverse possession, was *sub judice* in that Department until May 25, 1914 (R., 11); that is to say, until less than two years before the decree was rendered. Over lands of which the title is in this condition, it is very clear that the courts have no jurisdiction. *Humbird vs. Avery*, 195 U. S., 480, 502.

The question considered by the Supreme Court of Oregon in its first decision as to whether the Northern Pacific Company could lawfully acquire any title to the lands under its mineral indemnity selection, we purposely refrain from discussing, because it is not in issue here. The court's opinion on this point we conceive to be clearly wrong; but, whether right or wrong, it is, at all events, immaterial to the question here presented. The Northern Pacific Railway Company, like any citizen of the United States, has a right *to present its claim* to lands of which the title stands in the United States, and to have its claim considered by the Department whose duty it is in the first instance to consider such claims. If its claim is groundless, presumably the Department will reject it; or, even if it makes a mistake of law and allows it, the courts will correct the mistake in a proper proceeding, and declare the title erroneously given to be held in trust for the rightful claimant. In the case of the tract re-patented to the Railway Company under its mineral indemnity selection, for instance, the respondent has a clear remedy if, in fact, that patent ought to have been issued to him. But he cannot blow hot and cold; he cannot deny that the Railway Company ever had any right whatsoever in the lands, and yet acquire a prescriptive title to them under it.

CHARLES W. BUNN.

CHARLES DONNELLY.